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**PETITION OF LIBERTY POWER § PUBLIC UTILITY COMMISSION**  
**FOR EMERGENCY RELIEF §**  
**FROM ERCOT PROTOCOLS § OF TEXAS**

**DOCKET NO. 51617**

**OVERSIGHT OF THE ELECTRIC § PUBLIC UTILITY COMMISSION**  
**RELIABILITY COUNCIL §**  
**OF TEXAS § OF TEXAS**

**DOCKET NO. 51812**

**ISSUES RELATED TO THE STATE § PUBLIC UTILITY COMMISSION**  
**OF DISASTER FOR THE FEBRUARY §**  
**2021 WINTER WEATHER EVENT § OF TEXAS**

**PETITION FOR EMERGENCY RELIEF FROM LIBERTY POWER**

Liberty Power ("Liberty") files this petition and requests that the Public Utility Commission ("Commission") take the following action to protect Liberty from irreparable harm:

Temporarily waive section 9.6(2) of the Electric Reliability Council of Texas ("ERCOT") Nodal Protocols until such time as Liberty Power can exercise its dispute resolution rights under the ERCOT Nodal Protocols without incurring the immediate, significant expenses for which ERCOT has invoiced Liberty with respect to day-ahead market ("DAM") charges attributable to Ancillary Services during the February 2021 Winter Weather Event.

The Commission has the authority to order the Electric Reliability Council of Texas ("ERCOT") to deviate from the deadlines and timing in its Protocols and Market Guides related to settlements, collateral obligations, and invoice payments and suspend the execution or issuance of invoices, settlements, and payments for intervals during the dates of February 14, 2021 to February 20, 2021, until such time as Liberty's dispute with ERCOT is resolved.

This is an unnecessary financial crisis for retail providers and customers. The Commission needs to take action or the competitive market will collapse. Fixing the errors over time will not prevent irreparable harm to retailers like Liberty in the near term.

## **I. BACKGROUND**

On February 21, 2021, the Commission issued an “Order Directing ERCOT to Take Action and Granting Exception to ERCOT Protocols” (hereafter simply “Order”) which explained:

In an attempt to protect the overall integrity of the financial electric market in the ERCOT region, the Commission concludes it is necessary to authorize ERCOT to use its sole discretion in taking actions under the ERCOT Nodal Protocols to resolve financial obligations between a market participant and ERCOT. It is appropriate that ERCOT's discretion include, but not be limited to, ERCOT's ability to take the following actions:

- Deviate from protocol deadlines and timing related to settlements, collateral obligations, and invoice payments;
- Utilize available funds, such as undistributed congestion revenue right auction revenues, to cover short-paying invoice recipients;
- Relax credit requirements and releasing cash or other collateral to provide shortterm market-participant liquidity;
- Deviate from protocol requirements regarding the maximum amount of default uplift invoices;
- Suspend breach notifications to certain market participants for failure to make payment or provide financial security; and
- Produce reconciliation settlements following market stabilization.

In Response to the Order, ERCOT issued this notice on February 22, 2021:

ERCOT is temporarily deviating from Protocol deadlines and timing related to settlements, collateral obligations, and Invoice payments while prices are under review. Invoices or settlements will not be executed until issues are finalized by State leaders considering solutions to the financial challenges caused by the winter event, which is anticipated to occur this week.

One day later ERCOT issued a second notice which stated that “ERCOT has ended its temporary deviation from protocol deadlines and timing related to settlements, collateral obligations, and

invoice payments. Invoices and settlement will be executed in accordance with Protocol language.”

Furthermore, on February 15, 2021, Commission issued an Order in Docket No. 51617 instructing ERCOT to raise prices to the cap. Testimony during legislative hearings from both ERCOT and the Commission indicated that this step was necessary to prevent generation from coming offline. However, prices are determined by the auction model which is built around bids from load serving entities and offers from generators. Prior to the Order increasing prices the real time market was properly clearing with generators recovering costs. The need for the price increase has not been demonstrated and, indeed, the initial Order required prices to be adjusted in arrears, plainly showing that this was a means to compensate generation what generation felt it was owed rather than what generation indicated it needed to cover variable costs or how the market actually cleared. Liberty disputes the artificial increase in prices, through the ORDC adder. During the disputed period the energy-related ORDC adder created by the artificial demand instruction is estimated to be \$15,600,000 for Liberty.

During the February 2021 Winter Weather Event, Ancillary Services cleared levels astronomically higher than the ERCOT mandated high system-wide offer cap (“HCAP”) and were invoiced to Liberty and other electric suppliers, contrary to the market notice M-C021521-01/Legal issued by ERCOT on February 15, 2021 (“Legal Market Notice”), which in relevant part provides: “ERCOT may soon reach the Peaker Net Margin revenue threshold established in PUC Rule 25.505(g)(6), which requires ERCOT to use the Low System-Wide Offer Cap (LCAP) instead of the \$9,000 High System-Wide Offer Cap (HCAP) currently in effect.” The Winter

ERCOT Order<sup>1</sup> notes that use of the LCAP as required by the rule could result in prices that exceed the HCAP, given current gas prices. Consequently, the order directs ERCOT to “suspend any use of the LCAP until after the Commission’s regularly-scheduled next open meeting,” and to “continue to use the HCAP as the system-wide offer cap until that time. Furthermore, as indicated in Exhibit 1, the data posted by ERCOT in the Market Information section of its website indicated a system-wide offer cap of \$9,000 per MWh. Based on the invoices received so far the estimated RRS and Non-Spin Ancillaries charges for the disputed period February 15<sup>th</sup> through the 20<sup>th</sup> is \$14,100,000, of which the artificial ORDC adder is estimated to be \$5,600,000.

It is readily apparent that the Ancillary Services charges, typically related to providing a reliable (and operating) energy grid, reflect an algorithm that at least prima facie did not function in a reasonable and rational manner during the February 2021 Winter Weather Event. For example, in its training materials ERCOT describes its Responsive Reserve Service (“RRS”) as being “used under normal operations to recover from significant frequency deviations.” In other words, RRS is intended to ensure generation is online and available to ramp up in the case of a sudden drop in frequency. However, during the February 2021 Winter Weather Event, system frequency was actually managed by load shedding, which ERCOT confirmed during a meeting open to the public held on Wednesday, February 24, 2021. In this circumstance, market participants should not be charged for any RRS generation resources, as all available generation should have been dispatched to minimize the number of residents without power rather than being held in reserve. The same logic applies to Non-Spin Reserve (“NSR”) charges. In the

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<sup>1</sup> *Oversight of the Electric Reliability Council of Texas*, Docket No. 51617, Second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 16, 2021) (“Winter ERCOT Order”).

extreme circumstances of the Winter Weather Event, all available generation should have been online, with system disturbances managed through load shedding. Consequently, market participants should not have incurred NSR charges during the period in question.

Liberty will be disputing these charges. ERCOT's dispute resolution procedures, set forth in Section 9.14 of its Nodal Protocols, generally require disputes to be initiated within ten (10) business days after an invoice is posted by ERCOT, and ERCOT may request additional information regarding the dispute within seven (7) business days. Once a dispute is initiated, ERCOT will attempt to resolve a dispute within fifteen (15) days unless more time is requested because of the complex nature of a dispute. If a dispute is not resolved through the dispute resolution procedures set forth in Section 9.14 of the ECROT Nodal Protocols, the party raising the dispute may proceed to the Alternative Dispute Resolution Procedures outlined in Section 20 of the ERCOT Nodal Protocols.

The actions taken above negatively impacted the market, including suppliers like Liberty. Furthermore, ERCOT's processes do not provide any opportunity for market participants or policymakers to consider action to preserve the Texas competitive electricity market, nor does it provide sufficient opportunity for suppliers to adequately address their concerns about settlement invoices issued for the February 14-19, 2021 time period.

The requirement to pay the invoices immediately while disputing the charges through a comparatively lengthy process is inadequate and payment would cause irreparable harm. During a meeting open to the public held on February 24, 2021 as well as legislative hearings on February 25, 2021, senior ERCOT executives provided no assurances regarding their liquidity or any indication that they would temporarily suspend their invoice process.

## II. REQUEST FOR WAIVER

Liberty recognizes and appreciates the efforts by the Commission, ERCOT, and market participants during this weather emergency. This requested waiver is necessary to avoid irreparable harm by forcing Liberty to make payments immediately to ERCOT despite the continuing uncertainty surrounding the proper amounts of those payments and the requirements generally of Liberty to make those payments, when, by its own admission, ERCOT may not have sufficient liquidity to return any successfully disputed amounts.<sup>2</sup> In light of ERCOT's tenuous financial circumstances, and Liberty's belief that these charges attributable to ORDC, Ancillary Services are grossly inaccurate, Liberty will be unfairly prejudiced and irreparably harmed if forced to make payment of the disputed amounts. Forcing Liberty and other retail suppliers to make these exorbitant disputed charges at this time will be devastating and cause irreparable financial harm to Liberty, other suppliers, energy consumers in Texas, and other ERCOT market participants long after the immediate weather event has passed. Section 9.6(2) of the ERCOT Nodal Protocols requires "[e]ach Invoice Recipient shall pay any net debit and be entitled to receive any net credit shown on the Settlement Invoice on the payment due date, whether or not there is any Settlement and billing dispute regarding the amount of the debit or credit." Liberty

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<sup>2</sup> See ERCOT Market Notice M-B021921-01 Collateral Adjustments and Invoice Payments (Feb. 19, 2021) (announcing ERCOT would use "its available discretion under the Protocols" to adjust the collateral requirements for Counter-Parties on a case-by-case basis), *Issues Related to the State of Disaster for the Feb. 2021 Winter Weather Event*, Project No. 51812, Order Directing ERCOT to Take Action and Granting Exception to ERCOT Protocols (Feb. 21, 2021) (directing ERCOT to take certain actions and grant exceptions to the Protocols and Operating Guides to resolve protect overall integrity of the financial electric market and resolve financial obligations between market participants and ERCOT); ERCOT Market Notice M-A022321-01 ERCOT Discretion to Resolve Financial Obligations (Feb. 23, 2021) (noting that ERCOT was continuing to use its discretion authority under the PUCT's order of February 21, 2021, to help protect the overall integrity of the financial electric market, and noting that such actions by ERCOT would only provide limited financial support to address liquidity issues encouraging Counter-Parties to explore all available financial and/or business transition options, ERCOT Market Notice M-A02221-02 ERCOT has ended its temporary deviation from Protocol deadlines and timing related to settlements, collateral obligations, and invoice payments (Feb. 23, 2021) (ending temporary deviation from protocol deadlines and timing related to settlements, collateral obligations, and invoice payments).

anticipates disputing settlement invoices it has already received and paid, settlement invoices it has received but remain unpaid, settlement invoices not yet received, and potential resettlement invoices that Liberty anticipates receiving. However, according to the language of the ERCOT Nodal Protocols, Liberty is required to pay ERCOT these disputed amounts immediately while the disputes are pending, and, as noted above, it could take more than a month for these disputes to be resolved. Given the extreme emergency conditions faced by all market participants as a result of the extreme weather events, and the potential harm to Liberty and its customers if required to immediately pay these disputed amounts to ERCOT, waiver of this requirement to pay the ERCOT Settlement Invoice amounts while amounts are in dispute is reasonable and appropriate, particularly in light of ERCOT's own statement that it is uncertain if it has sufficient liquidity to last through Friday. In the alternative, the Commission has the authority to allow Liberty and other suppliers to the reasonably undisputed amounts and pay the balance upon resolution of the dispute, if any.

The Commission has broad powers, especially during an emergency, and the Commission continues to exercise this authority in issuing orders related to the February Winter Weather Event. Additionally, PURA § 39.151(d)<sup>3</sup> gives the Commission complete authority over ERCOT, the independent organization certified by the Commission under PURA § 39.151.<sup>4</sup> Therefore, granting this waiver is within the jurisdiction of the Commission. The Commission has broadly granted waiver of the ERCOT Nodal Protocols to the extent necessary to comply with the Commission's directives, and Liberty is requesting this waiver to the extent it is not

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<sup>3</sup> Public Utility Regulatory Act, Tex Util. Code §§ 11.001–66.016 (“PURA”).

<sup>4</sup> *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Order Directing ERCOT to Take Action And Granting Exception to ERCOT Protocols (Feb 21, 2021) (“February 21 PUC Order”).



covered by the Commission's current waiver of the ERCOT Nodal Protocols.<sup>5</sup> However, ERCOT has issued a series of inconsistent market notices which have effectively negated the relief the Commission has attempted to provide.<sup>6</sup> The Commission clearly has authority to grant the relief Liberty seeks, and the Commission has granted waiver of ERCOT Nodal Protocols in other instances where there is good cause to do so.<sup>7</sup> There is no doubt that Liberty's request is reasonable under the circumstances and good cause exists here to grant Liberty's requested relief.

Liberty's requested waiver is limited in scope and addresses an immediate, concrete problem related to emergency circumstances.<sup>8</sup> Liberty is not requesting that the Commission make a determination as to whether Liberty should be relieved of its payment obligations.<sup>9</sup> Liberty intends to address its disputes with ERCOT, including its claims with respect to payment obligations, through the dispute resolution procedures set out in the ERCOT Nodal Protocols.

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<sup>5</sup> February 21 PUC Order at Ordering Par. 2 ("Any and all provision of the ERCOT Nodal Protocols are waived to the degree necessary to allow ERCOT to take the actions ordered herein.").

<sup>6</sup> See supra note 3.

<sup>7</sup> See PURA § 39.151. The Commission has the specified authority to grant waiver of certain ERCOT dispute resolution procedures. 16 Tex. Admin. Code ("TAC") § 22.251(c). The Commission has also granted waivers where its authority to do so has not been explicitly established. See *Joint Report of Application of Sharyland Utilities, L.P., Sharyland Distribution & Transmission Services, L.L.C., and Oncor Electric Delivery Company LLC for Transfer of Facilities, Transfer of Rights Under and Amendment of Certificates of Convenience and Necessity, and for Other Regulatory Approvals*, Docket No. 47469, Order at Ordering Par. 20 (Oct 13, 2017) ("given that the proposed transaction is expected to close before ERCOT can update its Network Operations Model and possibly other ERCOT databases per timing requirements under the Protocols, ERCOT and joint applicants are granted a waiver of any timing requirements under the ERCOT Protocols related to updating ERCOT models, databases, and/or systems to reflect proper asset ownership resulting from the proposed transition").

<sup>8</sup> The Federal Energy Regulatory Commission has reviewed and granted at least one waiver requested as a result of the impacts of the last week's extreme weather. See *Southwest Power Pool, Inc.*, 174 FERC ¶ 61,136 (2021)

<sup>9</sup> See February 21 PUC Order (stating payment obligations are not excused).

Liberty is requesting that the Commission waive the requirements of Section 9.6(2) such that its payment obligations may be delayed until the dispute with ERCOT is resolved.

Alternatively, Liberty requests waiver of Section 9.6(2) and that the Commission require non-disputed payment amounts as described above to be placed into escrow until the dispute with ERCOT is resolved with respect to invoices Liberty has received but not yet paid, settlement invoices not yet received, and potential resettlement invoices that Liberty anticipates receiving. With respect to invoices Liberty already has paid, Liberty requests that the amounts paid be refunded by ERCOT (minus an undisputed amount based on a historical average), and Liberty's payment obligation be held in abeyance until the dispute is resolved, or, alternatively that the refunded amounts be placed into escrow until the dispute with ERCOT is resolved. This alternative approach would ensure that all payments are timely made pursuant to the ERCOT Nodal Protocols, but would also ensure that once Liberty's disputes with ERCOT are resolved, Liberty can be made whole in the event that the amounts due to ERCOT are less than previously invoiced.

Forcing Liberty to pay exorbitant settlement costs which exceed tariff caps, at this time, during an active dispute, would cause Liberty irreparable financial harm.

### **III. REQUEST FOR RELIEF**

The Commission's Order noted that PURA §39.151(d) gives the Commission complete authority over ERCOT and the Commission should exercise that authority in these extraordinary circumstances to take all necessary action to preserve the competitive electricity market during this emergency. Additionally, 16 TEX. ADMIN CODE § 25.501(a) provides that ERCOT determines market clearing prices of energy and other ancillary services in the ERCOT market unless otherwise directed by the Commission. PURA § 39.151(d-4) also provides that the

Commission may “resolve disputes between an affected person and an independent organization and adopt procedures for the efficient resolution of such disputes.”

Therefore, based on the Commission’s authority under Texas law, Liberty requests that the Commission grant a temporary waiver of section 9.6(2) of ERCOT protocols to give Liberty Power the additional opportunity to resolve its settlement dispute in accordance with ERCOT’s dispute resolution protocol without inflicting undue financial harm upon Liberty Power.

#### **IV. CONCLUSION**

Liberty understands that the Commission has the difficult task of assessing the events of last week. However, the market and suppliers such as Liberty cannot wait for long-term solutions. Until such time as the Commission, ERCOT and policymakers can develop more permanent changes, given the severe financial impacts that these invoices will have on Liberty, we respectfully request that the Commission immediately grant the relief sought and immediately restore the deviation to ERCOT Protocols as was originally issued by ERCOT on February 22, 2021, grant a temporary waiver of section 9.6(2) of ERCOT’s protocols or allow for Liberty to make payments of undisputed amounts pending resolution of its dispute, and provide such other and further relief as may be appropriate and necessary. Liberty respectfully requests that the Commission act immediately on its request.

Respectfully submitted,

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